In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1097

JOHN BURTON MOODY, M. D., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a trial by jury, petitioner, a physician, was convicted on all four counts of an indictment, returned on April 24, 1963 (R. 3a-6a),[1] charging him with wilfully attempting to defeat and evade his in-

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[1] Record references followed by "a" are to Appellant's Appendix in the court of appeals, those followed by "b" to the Appendix in the Brief of the United States in that court.

come taxes for 1956, 1957, 1958 and 1959 by filing false returns for those years, in violation of Section 7201 of the Internal Revenue Code of 1954. He was sentenced to pay fines totalling $6,000 and to serve concurrent terms of five years imprisonment on each count (R. 154a-156a). The court of appeals affirmed the conviction (Pet. 27-36).[2]

The decision below is correct and no issue of general significance, or conflict between circuits, is presented. Further review is accordingly not warranted.

1. Office records prepared from original entries made by petitioner on his patient cards, when compared with the testimony of the patients, disclosed 132 instances in which the fee was understated on the card. The total amount thus concealed was $5,023.70. (Pet. 29.) However, the cards—which were destroyed every six months—were not available to the investigating agents (R. 8b), and they therefore reconstructed petitioner's income by an analysis of his bank account. By this method,[3] the government

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[2] At the same time it remanded the case to the district court for reconsideration of the sentence. The court of appeals —which lacked access to the pre-sentence investigation report—felt the sentence might be excessive (Pet. 36).

[3] See Schmidt, *Legal and Accounting Handbook of Federal Tax Fraud* (1963), p. 305: "The basic elements of the bank deposit method of determining income * * * consist of a showing: (1) that the taxpayer was engaged in an income producing business or calling; (2) that he made periodic deposits of funds into bank accounts, and (3) that an adequate investigation of the deposits was made by the investigating agents in order to negative the likelihood that the deposits arose from some non-taxable source."

proved—beyond dispute, as the court of appeals noted—that petitioner had "$33,793.13 of taxable income for the four years in question, whereas defendant's returns for those years showed a total of $10,363.40." (Pet. 29.)

During the investigation, petitioner reviewed his borrowing record with the investigating agent and stated that all his financing had been "done at the bank * * * and that as of that date he did not owe any money on any notes payable" (R. 7b). Subsequently, in the course of a conference with representatives of the Department of Justice, petitioner's representatives submitted an affidavit of one Eddie Adkins, dated February 11, 1963 (R. 107b), which stated:

> In August of 1958 I loaned Dr. John Moody $5,000 in cash, as he needed some money to send his sons to school that fall.
>
> In August of 1959 I loaned Dr. Moody $4,000 in cash for the same purpose.
>
> He has repaid approximately $1,000.00 of this $9,000.00 and still owes me approximately $8,000.00.

The agent was advised of this affidavit by the Department of Justice just prior to the indictment, and he thereupon conducted a further investigation (R. 25a, 26a, 28a, 29a, 58a; Pet. 34.)

Eddie Adkins testified as a defense witness in the first trial of this case, which resulted in a conviction that was reversed on appeal because of erroneous rulings by the trial judge (339 F. 2d 161). He was

not called as a witness by either party at the second trial, but his prior testimony was developed, first by petitioner's cross-examination of the investigating special agent, and then, further, by the government's cross-examination of petitioner's accounting witness.

In cross-examining the investigating agent, petitioner's counsel read the contents of the Eddie Adkins affidavit into the record (R. 27a), on the theory that he was demonstrating a "lead" known to the agent prior to trial (R. 22a-23a, 46a, 48a, 50a). The government, on redirect examination of this agent, interrogated him as to his investigation of the affidavit and introduced it into evidence (R. 28a-29a; Pet. 31, fn.). In turn, petitioner's counsel, on recross-examination, elicited testimony from the agent as to Adkins' testimony in the first trial.[4]

An accountant testified on behalf of petitioner that he had spent two months investigating petitioner's tax liabilities, had heard the testimony of all witnesses in the first and second trials and considered all exhibits (R. 37a, 40a), and had computed peti-

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[4] "Q. Now, you know that Adkins had asserted that he was a crap-shooter and had brought that money back from Burma from gambling in the Army in a money belt?

* * * *

A. * * * Mr. Adkins did testify that he did come back from overseas with this money strapped around his waist, and that he didn't let his wife know he had it, and carried it around the country, either around his waist or would stick it in the back of the car, or something, and that, although he was borrowing, he did not let his wife know that he had this money, and that Dr. Moody was a good friend of his, and he loaned it without charging him any interest." (R. 30a).

tioner's income by both the bank-deposit and net-worth methods (R. 38a-40a), taking into consideration the alleged Eddie Adkins "loans" (R. 48a, 66a-67a). The accountant was cross-examined as to testimony of Adkins in the first trial that he had taken a note from petitioner secured by petitioner's office equipment (R. 52a), that his home and everything he possessed had burned up (R. 53a), that he had won, and brought back, some $13,000 to $14,000 from gambling on the Burma Road in World War II (R. 54a), and that he had kept this money in a money belt unbeknownst to his wife (R. 58a). Petitioner's accountant was further cross-examined as to Adkins' borrowing record, which included automobile, house, and numerous small personal and appliance purchase loans (R. 57a-64a).

2. a. Petitioner's contention (Pet. 9-17) that the government failed to verify the Adkins loans and that he was therefore entitled, as a matter of law, to have them considered as true is plainly without merit. The "lead-check" rule of *Holland* v. *United States*, 348 U.S. 121—assuming its applicability to reconstruction of income by the bank deposits method—is limited to "leads [furnished by the taxpayer] reasonably susceptible of being checked * * *" (348 U.S. at 135-136). The lower courts have not imposed an impossible burden on the government. See *United States* v. *Procario*, 356 F. 2d 614, 617 (C.A. 2), certiorari denied, 384 U.S. 1002 (acquittal not required by letter and witnesses' affidavits submitted to Department of Justice "on the eve of indictment"); *Brodella* v. *United*

States, 184 F. 2d 823, 826 (C.A. 6) (reinvestigation of new and contradictory contentions not required); *Kampmeyer* v. *United States*, 227 F. 2d 313, 317 (C.A. 8), motion for leave to file petition for writ of certiorari denied, 351 U.S. 904 ("vague" and "empty" assertions of prior hoards of money); *Mighell* v. *United States*, 233 F. 2d 731, 734 (C.A. 10), certiorari denied, 352 U.S. 832 (agents not required to interrogate taxpayer's son in military service about his alleged knowledge of buried hoard).[5] Under the cited decisions, it is doubtful the government had any duty to investigate Adkins' alleged gambling successes on the Burma Road many years previously. In any event, however, the lead was not ignored. The agent conducted a detailed investigation into Adkins' financial ability during the years 1958 and 1959 (Pet. 34), and the record shows that Adkins appeared before the grand jury which returned the indictment (R. 29a).[6] Moreover, the jury was in-

[5] The cases cited by petitioner (Pet. 9-14) do not take a contrary approach. *Merritt* v. *United States*, 327 F. 2d 820 (C.A. 5), held only that the government's net-worth computation failed where the investigating agent had failed to list and account for additional assets of which he admittedly had knowledge. *Lenske* v. *United States*, C.A. 9, decided October 5, 1966, 66-2 U.S.T.C. ¶ 9686, 18 A.F.T.R. 2d 5815, held only that the net-worth computation used in that case fell short of proving beyond a reasonable doubt that additional tax was due, because the proven deficiencies varied greatly from the deficiencies alleged and because speculative depreciation formulae had been relied on.

[6] It is plain that the trial judge's comment that the investigating agent "did not make any attempt to run that down, didn't consider it—in effect, didn't consider it a reasonable thing to do" (R. 48a) was addressed solely to the

structed (R. 50a-51a; 57b) that it was entitled to consider the government's obligation to follow up leads, whether furnished by the defendant or by others.

b. Petitioner's contention (Pet. 17-23) that the prosecutor's argument exhibited an "obvious motivation * * * to take advantage of the fairly general belief about petitioner's abortion practice" is not supported by the record. Only defense counsel referred in argument to "the general atmosphere" and "this terrible atmosphere," and to his client as "a somewhat unpopular individual" who might have done "some bad things that other people wouldn't do" (R. 86a, 92a, 94a). Petitioner made no timely objection to the prosecutor's rebuttal argument of which he now complains, and he informed the trial court he would not request any curative action by the court (R. 135a). Nor does the record show any request for a change of venue. And, as the court of appeals noted (Pet. 35), the prosecutor's concluding remark about not being able to prove "everything we may think or feel or believe" (R. 106a) might well have referred merely to the government's inability to identify income represented by local checks for which the bank kept no microfilm record.

c. There is no merit to petitioner's contention (Pet. 6-9) that the court's charge might have led the jury

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testimony of the agent (R. 30a) giving a negative response to counsel's question on cross-examination, "Well, now, in inquiring as to whether he received that money, did you inquire into his Army record, and find out from anybody that had served with him whether really he was a big gambler on the Lido Road as he had indicated?"

to believe that it could convict for failure to report income even if no additional tax was in fact due, in view of the many cautionary remarks of the judge on this question.[7]

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[7] The district court's charge informed the jury that the indictment was for willfully attempting to defeat and evade the payment of income taxes (R. 107a); that the government contended that petitioner attempted to evade taxes by filing returns which did not show his true income and did so with intent to evade tax liability (R. 108a), and that the case was an appropriate one for assessing penalties for willful attempt to defeat tax obligations (R. 110a); that filing a false return would be evidence of willful evasion if done in an attempt to evade petitioner's "tax liabilities, or any substantial part or parts of same" (R. 114a); that the offense charged required knowledge of a taxable income and a false return filed in an attempt to evade the tax or a substantial portion of it (R. 116a-117a, 119a); that the government's proof of tax deficiency would be sufficient if it showed that a substantial portion of petitioner's tax liability was not reported (R. 121a); that a "willful" attempt required an "intent to deprive the government of the tax imposed by law and which it was the duty of the taxpayer to pay to the government" (R. 117a); that willfulness required a "wrongful intent" which involved "knowledge of his tax obligations and * * * knowledge that such obligations exceed the amount being reported by him in his returns" (R. 117a); and that mere knowledge that one has income he does not report or pay tax on is not itself sufficient to constitute a violation (R. 117a-119a).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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